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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CIRO CALLICO, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ORIGINAL PETITION BY PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the refusal to allow petitioner to cross-examine the key government witness as to prior grants of immunity for his role in the murder of a federal judge and the large-scale importation of marijuana denied defendant his Sixth Amendment right to confront his accusers?

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IN THE

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October Term, 1981

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CIRO CALLICO, SR.,

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v.

UNITED STATES OF AMERICA,

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==========

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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The petitioner, Ciro Callico, Sr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 28, 1982.

OPINION BELOW

The opinion of the Court of Appeals in Callico v. United States, _____F.2d ____ (5th Cir. 1982) appears in the appendix hereto, consisting only of the directive "affirmed."

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 28, 1982. A timely petition for rehearing was denied on June 25, 1982. Petitioner sought and was granted a stay of the mandate pending disposition of the application for certiorari. This Court's jurisdiction is therefore invoked under 28 U.S.C. §1254(1). The application is being filed within sixty days of the denial by the Court of Appeals of the petition for rehearing, and is therefore timely under Rule 20 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

This case involved the Sixth Amendment and Federal Rules of Evidence 401 and 403. The Sixth Amendment provides that

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rule of Evidence 401 defines "relevant" evidence as,

> "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.

Federal Rule of Evidence 403 provides that

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

Appellant was indicted for and convicted of one count of conspiracy (18 U.S.C. §371), one count of embezzlement and misapplication of bank funds (18 U.S.C. §§656 and 2), eleven counts of making false statements to an F.D.I.C.-insured bank (18 U.S.C. §1014), and one count of causing a false entry to be made in a report or statement of the Hibernia Bank with intent to injure and defraud the bank and to deceive the bank and examiners of the Comptroller of the Currency and the Federal Deposit Insurance Corporation (18 U.S.C. §1005).

At trial the defendant was found guilty on each count, and was later sentenced to two years' imprisonment on each count, the sentences to run concurrently. The defendant appealed his conviction, but on May 28, 1982, the panel issued the one-word opinion "affirmed."

The principal witness against the defendant was one Victor J. Lota, a Vice President and loan officer of the Hibernia National Bank. Lota testified that the defendant had overextended his financial resources and had consistently sought help from the Hibernia. Lota had a limit on the total amount he could lend to any one individual before further loans would have to be reviewed by the Senior Loan Committee. Fearful that the committee would not give its approval to subsequent loans, defendant allegedly approached Lota and suggested that in return for kickbacks, Lota could approve loans in the names of persons other than the defendant, but with defendant

receiving the proceeds of the loans. According to Lota, defendant definitely knew this was illegal, and kickbacks were given.

Defendant admitted receiving the proceeds of many of the loans made to other persons, but claimed to have had the consent of those persons to receive the proceeds. He denied having paid Lota for Lota's role. Far from having instigated the scheme, defendant claimed that Lota had originally approached him, suggesting that only with more new accounts under his control at the Hibernia could Lota win a promotion.

The issue was clearly one of credibility. Either the defendant knew that the Hibernia was being deceived and that this was illegal, or he did not. In an effort to prevent a serious attack on Lota's credibility, the government filed a pretrial motion in limine, seeking to bar questions to Lota concerning a state grant of immunity extended to him for the thefts from the bank and Lota's part in a

marijuana importation scheme, and a federal grant of immunity extended in return for his testimony as a witness in the investigation of the murder of a federal judge. The trial court held that allowing the questioning about those grants of immunity would divert the jury's attention from the main issue of the trial, and that such grants of immunity were completely irrelevant to the case at bar.

The defense was allowed, however, to delve into Lota's original statement to a grand jury which had minimized the involvement of others, his subsequent failure of a lie detector test, and his later statements incriminating the defendant. The prosecution revealed on direct examination that after entering into a second plea bargain, Lota financed major drug transactions in both Florida and Louisiana. On the strength of the government's representations in the motion in limine, the defense was however barred from divulging the grants of immunity to Lota in

both the marijuana affairs and for Lota's testimony before a grand jury in connection with the Texas murder of a federal judge.

On appeal from his convictions, the petitioner raised three bases for a reversal. The Court of Appeals affirmed without opinion, and from this affirmance, the petitioner now seeks a writ of certiorari.

SUMMARY OF THE ARGUMENT

The limitations placed upon the defendant by the trial court prevented the petitioner from presenting an accurate picture of Victor Lota to the jury. The jury saw a philanderer and a man who had chosen to turn government's witness in the case at bar. It did not see the man who could have spent the rest of his life in prison but for the his past, present, and future cooperation with the government.

The Sixth Amendment to the United States Constitution guarantees the accused the right

to confront the witnesses against him. By concealing Lota's interest and bias, the defendant was not allowed to confront the witness against him: a completely different person took the stand.

ARGUMENT

WHETHER THE REFUSAL TO ALLOW PETITIONER TO CROSS-EXAMINE THE KEY GOVERNMENT WITNESS AS TO PRIOR GRANTS OF IMMUNITY FOR HIS ROLE IN THE MURDER OF A FEDERAL JUDGE AND THE LARGE-SCALE IMPORTATION OF MARIJUANA DENIED DEFENDANT HIS SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSERS?

The Sixth Amendment of the United States Constitution guarantees to an accused the right to be "confronted with witnesses against him." The Supreme Court has repeatedly stated that the major right secured for the defendant by the Sixth Amendment is the opportunity to cross-examine all witnesses. Davis v.

Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1947); Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). While a trial judge has broad discretion under the Federal Rules to limit cross-examination on irrelevant matters or on matters where the probative value of any evidence might be adduced is outweighed by its prejudicial effect (F.R.E. 401, 403), he may not so limit cross-exmination as to affect the substantial Sixth Amendment rights of the accused.

The jurisprudence has long recognized that a witness' bias or self-interest may affect his testimony, and has therefore held that

> the partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony.

Davis, 415 U.S. at 316. In Davis, the Court held the right of confrontation so important

where credibility was the major issue at trial that an otherwise valid state law preventing attacks using juvenile adjudications was forced to cede ground to the privilege. In Greene v. Wainwright, 634 F.2d 272 (5th Cir. 1981), this Court reviewed the denial of a writ of habeas corpus to a state prisoner who alleged an improper limitation on his right to confrontation. Greene had been charged with the sale of marijuana to a member of the Jacksonville Sheriff's Office, one Kennerly. Greene claimed that the situation was reversed, and that he had actually been buying and Kennerly was the party selling. A pretrial deposition of Kennerly revealed that defense counsel would seek at trial to question him regarding his mental condition and several bizarre criminal incidents in which he (Kennerly) had participated, such as the shooting out of a barroom window. A pretrial motion in limine was sought by and granted to the state, restricting

questioning to the events surrounding the sale itself and the subsequent chain of custody of the marijuana seized. A straight credibility choice was presented to the jury. The Fifth Circuit granted the writ denied in the district court, stating that it could

> conceive of at least two theories of impeachment that defendant might have proposed had he been granted his constitutional rights. First, he might have argued that Kennerly was testifying to avoid prosecution for other illegal activities. "It is especially important in a case where a witness or an accomplice may have substantial reason to cooperate with the government that a defendant be permitted to search for an agreement between the government and the witness." United States v. Crumley, 565 F.2d 945, 949 (5th Cir. 1978). Whether or not such a deal existed is not crucial. United States v. Mayer, 556 F.2d 245, 249 (5th Cir. 1977). What counts is whether the witness may be shading his testimony in an effort to please the prosecution. "A desire to cooperate may be formed beneath the conscious level, in a manner

> not apparent even to the witness, but such a subtle desire to assist the state nevertheless may cloud perception." Burr v. Sullivan, 618 F.2d 583, 587 (9th Cir. 1980). See United States v. Onori, 535 F.2d 938, 945 (5th Cir. 1976).

Though the government asserted in its motion in limine that the state grants of immunity and the federal grant of immunity concerning the Texas murder of a federal judge were not made directly in return for Lota's testimony in the appellant's case, Greene makes clear that the jurisprudence is to the effect that bias may be on a subconscious level. The jury should have been informed of Lota's grants of immunity for state and federal importation or possession of marijuana with intent to distribute charges, as well as the grant of immunity in the Texas murder case. Lota may have denied that those deals with other authorities in any way affected his testimony against the appellant, but the question was properly for the jury

to decide. The jury may well have considered that a fear that those deals would fall through had influenced his testimony.

Davis v. Alaska held that the evidence sought to be presented in this case was relevant. Greene v. Wainwright held that such evidence was both relevant and probative. As Rule 403 is slanted in favor of the admissibility of evidence, it is clear that the trial court abused its discretion in granting the motion in limine. It matters little that the prosecution feared that the newsworthiness of the Texas murder might distract the jury, as the prosecution cannot argue that Lota is more worthy of belief for have participated in a notorious murder, and would be less worthy of belief (and evidence of immunity admissible) had he participated in a murder which made only the back page of the Sunday newspaper.

The question remains as to whether any error committed is reversible. The Fifth Circuit cases appear to hold that no

prejudice has been committed if the defense has the opportunity to "place the witness in his proper setting and put the weight of his tesimony and his credibility to a test..." Though seldom attributed, these lines are drawn from Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931). The full quote reads that

> [p]rejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. [Citations omitted.] To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief is to deny a substantial right to a fair trial.

282 U.S. at 693. This seemingly unbending standard has not been altered in the opinions of the Supreme Court, (See Davis, supra at 318), but the lower courts have continuously

affirmed convictions where the defense was unable to introduce the substance of the charges against the government witnesses.[1]

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[1] In United States v. Zarattini, 552 F.2d 753 (7th Cir. 1977), the co-conspirator turned government witness testified on direct examination as to his involvement in interstate thefts other than that for which the defendant was on trial. He admitted that he had pled guilty to one other theft charge, and had one pending. It was held to be no abuse of discretion to prevent defense counsel from inquiring as to the details of those other charges, as their existence had been admitted.

In United States v. Hirst, 668 F.2d 1180 (11th Cir. 1982), a co-conspirator in a marijuana importation scheme turned government's witness. On cross-examination, defense counsel was barred from asking about the witness' prior involvement with drugs. On appeal, however, defense counsel claimed not to have been impeaching the witness' credibility, but rather wanting to challenge the witness' assertion that he was unable to estimate the quantity of marijuana sold to an undercover agent. In affirming the conviction, the Court noted that a logical examination of the transcript showed that the witness had in fact had no experience with the quantity of marijuana about which he was to be asked.

In United States v. Andrew, 666 F.2d 915 (5th Cir. 1982), a doctor convicted of illegally dispensing dilaudid and preludin claimed error in disallowing questions of a government witness as to the maximum term that witness could have faced had not he volunteered to testify for the government. On appeal, the Fifth Circuit affirmed, stating that counsel had been permitted to ask the witness if he had not indeed faced a "substantial" sentence, if certain of his charges

In the case at bar, defense counsel was not permitted to elicit that on the state marijuana charges alone Lota faced a greater sentence than he received on all the federal charges. Petitioner was not allowed to bring out Lota's complicity in the Texas murder of Judge Wood. These limitations prevented the defendant from in any manner impressing upon the jury the true scope of Lota's criminal activity and his ensuing debt to the authorities for the grants of immunity he had received.

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had not been dismissed and a probationary sentence imposed on another, and if the witness had not participated in extensive plea bargaining with the prosecutor's office.

The cases of this ilk (Andrew, Hirst and Zarattini) are distinguishable from the case at bar. In Hirst, the questions were eventually found irrelevant because the desired impeachment could not have been achieved. In Andrew and Zarattini extensive questioning revealed the full extent of the government witnesses' violations of the law. See also Skinner v. Cardwell, 564 F.2d 1381 (9th Cir. 1977).

In United States v. Davis, 639 F.2d 239 (5th Cir. 1981), the Fifth Circuit harkened back to Davis v. Alaska and Alford v. United States in once again espousing the Chapman "harmless error beyond a reasonable doubt" standard in the review of limitations upon cross-examination. Though this standard is given lip-service in the Fifth Circuit such a review would show the prejudice occasioned the defendant by the grant of the motion in limine. Lota was shown to be an embezzler and a thief, but the true extent of his debt to the government was never revealed. The jury was deprived of the chance to place the key government witness in his "proper setting" as the trial court assumed the burden of making a credibility choice not properly its own.

CONCLUSION

To remedy the denial of his Sixth Amendment rights, petitioner respectfully requests that the Court issue a writ of certiorari, vacate the conviction, and remand the case to the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing PETITION OF CERTIORARI have been served on Harry McSherry and Paul Winick, Assistant United States Attorneys, Hale Boggs Federal Bldg, 500 Camp Street, New Orleans, Louisiana 70130, by deposit in the U.S. Mail

of those copies properly addressed and postage prepaid, on this _____ day of August, 1982.

_____
Counsel for Petitioner